SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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April 27, 2011

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RE: *State v. Omar Brown*
ID # 1009013840

Upon Defendant's Late-Filed Motion to Suppress Evidence –
DENIED

Dear Counsel:

The Wilmington police spotted Defendant walking, late at night. Although they had no real suspicions, they thought they recognized him. So, they approached and from their stopped police car, an officer asked Defendant if they could speak with him. He agreed. The officer asked his name, and Defendant gave a false one. Believing he knew Defendant from past encounters, the officer "ran" what he correctly thought was Defendant's real name. In the process, the police learned Defendant was wanted, and they then arrested him. Later, they searched him pursuant to the arrest and found drugs, which Defendant now wants suppressed as poison fruit.

I.

Although, as discussed below, the time between the initial contact and Defendant's arrest was brief, the analysis here goes moment-to-moment. Based on the February 11, 2011 suppression hearing's testimony, the court finds that Wilmington police officers were "engaged in a park and walk" patrol around 12:45a.m., on September 16, 2010.

Two officers spotted Defendant at a street corner. He seemed to "observe them" and he "quickly" walked away. Those officers, who were walking, radioed two other officers, who were parked in a nearby patrol car, about what had just happened. The officers stopped, and the first pair of officers gave the second pair a "broader" description, including a clothing description.

The second pair of officers then probably drove the wrong way down a one-way street and approached Defendant. According to the officer who testified, he asked, "Sir, can we talk to you?" Defendant "stopped and he said, 'Yeah, sure.'" Then, the officers "exited the vehicle and attempted to obtain his name." Defendant gave a name that the officer believed was false. The officer "had prior engagements"with the person whose name Defendant provided. The officer "had locked him up a few times, as well." Moreover, the officer had similar dealings with Defendant. The officer knew Defendant from memory as "Omar."

Once Defendant gave what the officer believed was a false name, the officer walked back to the police car and, using its computer, quickly confirmed Defendant's true identity. The officer also learned that there were two active warrants for Defendant. Only then did the police formally take Defendant into custody. When they got to police headquarters, Defendant was skin-searched and drugs were allegedly found on his person.

Defendant's version is different, in part. He does not admit or deny that the first contact happened. He admits giving the false name, but he also testified that the first words from the police were, "Mr. Brown, hold it." If believed, that would make it seem that the police stopped and detained him for no reason, except that he was Omar Brown.

Even if Defendant's version of events were more believable than the arresting officer's, then the police only forced Defendant to stand still long enough for them to check for warrants under what they knew, on their own, was his name. It makes little sense, however, that if the police called out to Defendant by his real name, as he testified they did, he, nevertheless, gave the police a false name. While that could be true, it is not very believable. It is less believable than the police officer's testimony about how he identified Defendant, using his memory and the computer. Thus, it is less likely that the police immediately told Defendant to "hold it," and it is more likely the police began the encounter by asking Defendant if they could speak with him. In that light, it makes sense that Defendant gave the false name, hoping the police would buy it and not discover he was a fugitive.

II.

The first police contact, when the police spotted Defendant and he walked away, resulted in no interference with his liberty, not even momentarily. At that point, Defendant did not see the police or, if he did, he obviously felt free to walk away. Either way, he walked on.

The second encounter, a few moments later, presents a closer question whether the police unreasonably interfered with Defendant's freedom of movement. As a matter of law, "law enforcement officers are permitted to initiate contact with

citizens on the street for the purpose of asking questions."[1] Moreover, "mere police questioning does not constitute a seizure. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual."[2] Here, the police merely asked Defendant, politely, if they could speak with him. Instead of walking on as in the first contact, or otherwise ignoring the police, Defendant chose to fade them with a false name. That was Defendant's choice, and Defendant's choice is inconsistent with defense counsel's argument that Defendant was intimidated by the way the police approached Defendant. Although they approached Defendant from the "wrong" direction, they did not turn on their car's emergency lights or siren. They did not block his movement, nor did they get out of the car.

Almost immediately after Defendant agreed to speak, he gave the police a false name. At that instant, the city police knew Defendant did not want contact with the police, and he had chosen to lie when asked by them about his identity. They accurately believed Defendant had a criminal history. Although the police did not put it in these words at the suppression hearing, it seems their vague and insubstantial suspicions ripened in light of Defendant's behavior during their brief encounter, while Defendant was freely making his own decisions about how to react in his best interest.

Had Defendant kept walking, as he did during the first contact, the police testified they would not have stopped him. Of course, they might then have run Defendant's true name and arrested him all the same, or not. Nevertheless, if Defendant were free to ignore the police and take his chances, he was not free, at 12:45 a.m. and with his history, to attempt to mislead the police with total impunity.

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[1] *Williams v. State*, 962 A.2d 210, 215 (Del. 2008) *citing Lopez-Vasquez v. State*, 956 A.2d 1280, 1286 n. 5 (Del. 2008).

[2] *Id. citing Muehler v. Mena*, 544 U.S. 93, 101 (2005).

Again, for clarity's sake, the police only interfered with Defendant's liberty by asking him if they could speak with him, and then only by asking his name. Defendant's testimony to the contrary notwithstanding, they did not demand that he stop. Even Defendant agrees the police did not demand that Defendant provide proof of identity. In the few moments between their asking if he would speak with them and their learning he was wanted, the police did not touch Defendant. Moreover, before his formal arrest, the police obtained no evidence from Defendant, not even his name. All the police got from Defendant was a moment of his time, and a name, that the police had reason, of their own, to disbelieve.

The only thing Defendant argues was unreasonable about the police behavior was the allegedly intimidating way the police approached him, coming from the wrong direction, before they asked if they could speak with him. They did not, however, use their lights or siren. They did not use their car or their bodies in a blocking fashion. They did not use any display of force. They did not even get out of the car until Defendant had agreed to speak with them. Even if the officers had gotten out of the car sooner, the Delaware Supreme Court has held "that the presence of uniformed police officers following a walking pedestrian and requesting to speak with him, without doing anything more, does not constitute a seizure under Article I, § 6 of the Delaware Constitution."[3] Taking everything into account, as provided above, the police acted reasonably when they approached Defendant and asked to speak with him. Again, the approach and initial request to talk are all that allegedly poisoned the fruit.

Finally, the parties have not found much authority on the refined fact-pattern presented here. Defendant relies on *Texas v.Brown,*[4] which is neither on point

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[3] *Ross v. State*, 925 A.2d 489, 494 (Del. 2007).

[4] 443 U.S. 47 (1979).

nor helpful. The State, however, presents *People v. Tolentino*.[5] *Tolentino* is distinguishable and not controlling, but its analysis is interesting.

In *Tolentino*, New York's highest court holds that the exclusionary rule's rationale "would not be served by its application to identity-related evidence."[6] Here, the exclusionary rule is not implicated because the police acted reasonably; Defendant was not cowed into submission, and the State is not using Defendant's (false) self-identification against him directly. But, even if the police conduct here were overbearing, which it was not, *Tolentino* explains why applying the exclusionary rule here would not promote the rule's salutary purpose. That is an alternative, but only an alternative, holding here.

For the foregoing reasons, Defendant's late-filed motion to suppress evidence obtained after Defendant was independently identified by the police and arrested on an outstanding warrant, is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes
oc: Prothonotary (Criminal)

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[5] 926 N.E.2d 1212 (N.Y. 2010); *cert. granted*, 131 S.Ct. 595 (2010); *cert. dismissed as improvidently granted*, 131 S.Ct. 1387 (2011).

[6] *Id.* at 1216.